87-1364

Supreme Court, U.S.
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CASE NO.

In the Supreme Court of the United States

October Term, 1987

RAMON MILIAN-RODRIGUEZ,

Petitioner/Appellant,

vs.

UNITED STATES OF AMERICA

Respondent/Appellee

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH JUDICIAL CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the filing of additional authority supporting Petitioner's Motion to Suppress evidence, and a renewal of the Motion to Suppress, after the trial court's cutoff date for the filing of motions, but before trial, waived Petitioner's right to a ruling on the merits of the Motion pursuant to Rules 12(b)(3) and 12(c) of the Federal Rules of Criminal Procedure.

2. Whether the failure of the trial court to suppress the evidence seized in the search constituted plain error.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH JUDICIAL CIRCUIT

The Petitioner, RAMON MILIAN-RODRIGUEZ, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINION BELOW

The Order and Opinion of the United States Court of Appeals for the Eleventh Circuit, *United States v. Milian-Rodriguez*, 828 F.2d 679, (11th Cir. 1987) is reprinted in the Appendix hereto.

JURISDICTION

This Petition arose in the first instance from criminal charges filed in the District Court for the Southern District of Florida. An appeal from the judgment and commitment order rendered by the Court was appealed to the United States Court of Appeals for the Eleventh Circuit pursuant to the jurisdiction vested in the Court by 28 U.S.C. 1291.

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. 1254.

STATEMENT OF THE CASE

(i) Course of Proceedings and Disposition Below

On May 13, 1983, the government returned an indictment against RAMON MILIAN-RODRIGUEZ. (R1-1). This indictment was superseded on October 18, 1983. (R1-54). Count 1 of the superseding indictment contained a charge of racketeering which alleged that MILIAN-RODRIGUEZ' currency exchange company, Cambios Monetarios Internacional (hereinafter referred to as "Cambios") was an enterprise engaged in transferring the proceeds of narcotics trafficking to Panama, all in violation of 18 U.S.C. Sections 1961(1)

and (5). Counts 2 through 48 charged violations of 18 U.S.C. Section 1952 (Foreign Travel in Aid of Racketeering, hereinafter referred to as the "Travel Act") on forty-seven different occasions; these violations were also alleged in Count 1 as the predicate acts to establish a pattern of racketeering. Counts 49 through 58 alleged that MILIAN-RODRIGUEZ, as Cambios, failed to file IRS Forms 4789, or "Currency Transaction Reports" (hereinafter referred to as "CTRs"), in violation of 31 U.S.C. Sections 5313 and 5322(b). Counts 59 and 60 alleged the failure to file Forms 4790, or "Reports of International Transportation of Currency or Monetary Instruments" (hereinafter referred to as "CMIRs"), in violation of 31 U.S.C. sections 5316 and 5322(b). Count 61 alleged that MILIAN-RODRIGUEZ possessed 61 pounds of cocaine in violation of 21 U.S.C. section 841(a)(1), and Count 62 charged him with possessing counterfeit money with the intent to defraud in violation of 18 U.S.C. section 472.

MILIAN-RODRIGUEZ moved to suppress virtually all evidence in the case. (R1-59). A lengthy hearing was held on the motion, (R14-17), which initially was granted in part. See (R1-70). The government appealed, and the Eleventh Circuit reversed the suppression order, (R1-152), in an opinion reported at 759 F.2d 1558 (11th Cir. 1985). After the government argued that MILIAN-RODRIGUEZ' Petition for Certiorari from that order was premature, it was denied. (R3-173). [Reported at 106 S.Ct. 135 (1985).]

Subsequently, MILIAN-RODRIGUEZ renewed his motion to suppress. (R3-180). This motion was also denied. (R26-24, 25).

MILIAN-RODRIGUEZ was tried on all counts. At the close of the prosecution's evidence, counsel for MILIAN-RODRIGUEZ moved for a judgment of acquittal, which was denied. (R32-944). This motion was renewed at the close of all the evidence and again denied. (R36-1954). The jury subsequently found MILIAN-RODRIGUEZ guilty on Counts 1 through 60, was unable to reach a verdict on Count 61, and acquitted him on Count 62. (R3-196). The Court sentenced him to a cumulative jail term of 35 years and a total cumulative fine of $6,495,000. (R3-205). MILIAN-RODRIGUEZ timely appealed to the Eleventh Circuit, (R3-207), but the judgment was affirmed on appeal and the subsequent Motion to Reconsider denied. *United States v. Milian-Rodriguez*, 828 F.2d 679 (11th Cir. 1987).

(ii) Statement of the Facts

The facts which led to the initiation of this prosecution, clearly viewed only in a light most favorable to the government are recited in the opinion of the Eleventh Circuit, a copy of which is appended to this Petition. Although these facts give an overview of a portion of the prosection's case and will therefore not be reiterated insofar as they were again testified to at trial, this Statement of the Facts will supply material omissions as they relate to particular points of error asserted by MILIAN-RODRIGUEZ in the Argument portion of this brief.

MILIAN-RODRIGUEZ was believed by the government to be the launderer of huge sums of money for narcotics traffickers. His method of operation,

according to prosecution witnesses, was to fly large amounts of currency to Panamanian banks, where it could be secretly "laundered" due to Panamanian bank confidentiality laws. (R29-238). It is undisputed that MILIAN-RODRIGUEZ, through the company Cambios, did in fact transport large amounts of cash, as well as non-bearer instruments (such as checks with restrictive endorsements) to Panamanian banks.

The government alleged that MILIAN-RODRIGUEZ knew he was required to file Currency Transaction Reports (CTRs), but failed to do so. MILIAN-RODRIGUEZ contended that he did not know he was considered a financial institution with the legal obligation to file. Although he filed between 80 and 100 Reports of International Transportation of Currency or Monetary Instruments (CMIRs), the government contended that MILIAN-RODRIGUEZ only reported a portion of the cash on the CMIRs.

When stopped on May 4, 1983, MILIAN-RODRIGUEZ had not yet filed CMIRs for the full amount of the currency on the plane. The government repeatedly emphasized this point and inferred that he never planned to file for the full amount since the law required that CMIRs be filed prior to departure. MILIAN-RODRIGUEZ testified, however, that the nature of the currency exchange and sale business is that the needs of the parent office constantly changed, and since he answered to Henry Ford in Panama on all aspects of the business, (R36-1738), he never knew until the last minute the amount he was to transport, nor how much of it would be in checks restrictively endorsed just prior to departure. (R35-1557, 1560). Because he could

therefore not file accurately-executed CMIRs until immediately prior to departure, and he always left prior to the opening time of Customs at Fort Lauderdale airport in order to make his round trip to Panama within business hours, (R32-1095), MILIAN-RODRIGUEZ was often forced to either have his father file the form later in the day, (R32-1125), or file an initial CMIR form according to the expected amount required to be reported and later amend it, filing either in person or by his father, or by mail. (R35-1583). Although the government stated that mail filing was not allowed, evidence showed that CMIRs filed by mail had not been challenged over a course of time.

A primary dispute prior to trial was whether or not the defense motions to suppress should be granted. The opinion of the Eleventh Circuit, rendered in the government's appeal of the trial court's suppression of the evidence in the first two paragraphs of the recitation of the facts, 759 F.2d at 1560, summarizes the prosection's evidence at the suppression hearing, but omits some crucial details relative to the issue presented in this appeal.

First, the agent who supervised the stop of the airplane clearly indicated that on May 2, 1983, he had reason to believe that MILIAN-RODRIGUEZ would be departing within the next day from Fort Lauderdale International Airport. Agent Arthur Sumrall testified that in the course of a continuing investigation of MILIAN-RODRIGUEZ, agents had noticed that whenever MILIAN-RODRIGUEZ was leaving for Panama, he would follow a particular procedure which enabled the agents to predict his movements and

departures. Specifically as to departures on April 21, 1983 and April 26, 1983, each time it was observed that MILIAN-RODRIGUEZ' Learjet was readied for departure at Walker's Cay Jet Terminal at the airport, with an auxiliary power unit being hooked up to the plane. (R14-16, 24). Additionally, the agents knew that MILIAN-RODRIGUEZ normally departed early in the morning, (R14-16), and filed a flight plan to Panama in advance of departure.

The agent testified that on May 2, 1983, the Learjet was again in position at Walker's Cay, and the auxiliary power unit was again in service. (R14-30). He further admitted that MILIAN-RODRIGUEZ had filed a flight plan for May 3, (R14-30), although he did not then depart, and again for May 4. (R14-33).

As noted in this Court's earlier opinion, the agents also had reason to believe that MILIAN-RODRIGUEZ was transporting large amounts of currency for which neither CTR nor CMIR forms had been filed. This was the rationale for the stop of the plane; it was admitted that MILIAN-RODRIGUEZ was stopped pursuant to the authority to detain for customs searches. (R30-402, 403). Thus, the agents had planned in advance to stop MILIAN-RODRIGUEZ once they believed that currency had been loaded on the Learjet, but the purpose of this stop was solely to obtain evidence for use in their continuing investigation. (R14-35, 148). The agents specifically planned *not* to arrest him in order to continue their investigation into the source of the money. (R14-35, 36).

The agent further testified that no evidence was seized from the plane until the passengers on the plane had disembarked and the agents had full control over the Learjet. (R14-40, 42).

REASONS FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED BECAUSE PETITIONER'S CASE PRESENTS ISSUES RELATED TO FEDERAL PRINCIPLES OF OVERRIDING IMPORTANCE AND WHICH HAVE NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT.

The relevent portions of Rule 17 of the Supreme Court Rules governing the certiorari jurisdiction of the Court state:

> **Rule 17. Consideration governing review on certiorari**
>
> .1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.
>
> (C) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

In *United States v. Milian-Rodriguez,* 828 F.2d 679 (11 Cir. 1987), the court of appeals decided for the first time, that a defendant, by bringing new case law to the court's attention during the pre-trial period, but after the court's cut-off time for the filing of motions, waives its right to have its motion to suppress decided on the merits.[1]

The facts are undisputed. In 1983, the appellant, RAMON MILIAN-RODRIGUEZ, through counsel, filed a motion to suppress virtually all evidence in this case. (R1-59). The motion sought to deny to the government the use of, among other items, the evidence seized from the airplane *on the ground that the government agents needed a warrant to search the airplane.* Although other evidence was suppressed pursuant to appellant's motion, the court upheld the search of the airplane.

The government appealed, and the Eleventh Circuit reversed the trial court's order suppressing the evidence. *United States v. Milian-Rodriguez,* 759 F.2d 1558 (11th Cir. 1985). At that time, appellant attempted to have this Court decide the issue of the warrantless search, but appellant's Petition for Certiorari was denied as being premature. *United States v. Milian-Rodriguez,* 106 S.Ct. 135 (1985).

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[1]The appeal cited herein is the second involving this defendant. The first was reported as *United States v. Milian-Rodriguez,* 759 F.2d 1558 (11th Cir.), *cert. denied,* ____ U.S. ____, 106 S.Ct. 135, 88 L.Ed.2d 112 (1985).

Subsequently, counsel for MILIAN-RODRIGUEZ *renewed* appellant's suppression motion. It must be emphasized that this *renewal* was not based on new grounds, but on the *same* ground as the motion filed (and denied) in 1983. It was based *on the ground that the government agents needed a warrant to search the airplane.* The major change in the motion was that counsel brought additional authority to the court's attention, to wit: *United States v. Chemaly,* 741 F.2d 1346 (11th Cir. 1984), *vacated,* 741 F.2d 1361, *reinstated,* 764 F.2d 747 (11th Cir. 1985) (*en banc*).

The holding in *Chemaly* was that, under Title 31 U.S.C. 1101 (recodified at 31 U.S.C. 5317) as it existed at the time of the search, the border exception to the Fourth Amendment's warrant requirement did not allow warrantless searches for currency violations. This holding would clearly have been controlling in the instant case.[2]

The panel adroitly avoided the import of *Chemaly,* however, by ruling that the failure of counsel for appellant to supplement its earlier-filed motion with additional authority, ie, *Chemaly,* by the deadline set by the trial court for the filing of new or additional motions, constituted a waiver of the issue, *even though*

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[2]One month after the Eleventh Circuit rendered the opinion in *Chemaly,* Congress amended section 5317 and voided the warrant requirement. Comprehensive Crime Control Act of 1984, Pub.L. No. 98-473, tit. II, section 901(d), 98 Stat. 2135 (codified at 31 U.S.C. 5317(b) (Supp. III 1985).

the renewed motion was based on the same evidentiary objection as the initial motion.

Initially, it must be noted that the government was in no way prejudiced by this "late" filing. The *Chemaly* decision was rendered in a case which arose right out of the office of the United States Attorney for the Southern District of Florida. Obviously, the government was aware of *Chemaly,* even before the filing of the renewed motion.

Nor can the court's decision be supported on the basis of the cases cited in its opinion, for they are all distinguishable. For example, the court cites *United States v. Worthington,* 698 F.2d 820 (6th Cir. 1983) in support of its ruling. But *Worthington* is clearly distinguishable on its facts. In *Worthington,* the defendant timely filed a "Motion To Suppress evidence And To Dismiss Or Quash The Indictment." But the Motion consisted solely of conclusory allegations, totally unsupported by facts. Then, 45 minutes prior to trial, defendant filed a *second* Motion To Suppress Evidence, citing the facial insufficiency of the search warrant. After a mistrial terminated the first trial, the second trial was commenced.

On the 20th day of the new trial, the defendant filed a "renewed" Motion To Suppress, alleging, for the first time, that the scope of the search warrant was too broad. The trial court specifically found that this new motion was *not* a *renewal,* but merely an attempt to clothe a new motion with old clothes in order "to try and get around the rule." *Worthington,* at 823. Clearly, this can be distinguished from the instant case.

Similarly, *United States v. Sisca*, 503 F.2d 1337 (2d Cir.) (same), *cert. denied*, 419 U.S. 1008, 95 S.Ct. 328, 42 L.Ed.2d 283 (1974), is inapplicable. In *Sisca*, the 2d Circuit found that counsel for the defendant had *deliberately* refrained from filing a pre-trial motion to suppress for reasons of trial strategy, in order to obtain a ruling during the course of trial. The purpose of this strategy was to deny the government the opportunity to appeal a pre-trial ruling suppressing the evidence, thus prejudicing it. This is hardly analogous to the case *sub judice*, wherein a detailed motion to suppress on the grounds that a warrant was required, amply supported by uncontested facts, was filed *years* before trial.

Certainly the Court would agree that the government should be held to the same standard as the defendant. Due process demands no less. And yet, if this be so, how can *United States v. Campagnuolo*, 592 F.2d 852 (5th Cir. 1979), be distinguished from the instant case?

In *Compagnuolo*, the government failed to provide the grand jury testimony of one of its witnesses to the defense, which had claimed it was *Brady* material.[3] The trial court suppressed the evidence and dismissed the indictment with prejudice for the violation. The 5th Circuit reversed. In ruling that the testimony was discoverable only pursuant to the Jencks Act, the court specifically stated (at 861, n. 10):

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[3]*Brady v. Maryland*, 373 U.S. 83, 8S S.Ct. 1194, 10 L.Ed.2d 215 (1963).

> The appellees contend that the government made no specific argument before the district court that the Jencks Act barred that court's order requiring early discovery of Aurillio's grand jury testimony. Even if that was the case, that omission would not result in a waiver. The prosecutor did argue that dismissal was improper because the delay in disclosure did not prejudice the appellees. As our discussion in Part III *infra* makes clear, that argument raised the proper legal standard for deciding a motion to dismiss an indictment.

Where as in the instant case, the defendant has put the trial court on notice that it is objecting to a search on the ground that a warrant is required, an appellate court should give a conviction close scrutiny "when the failure to preserve the precise grounds for error *is mitigated by* [*an objection*] *on related grounds.*"[4]

This Court, in previously evaluating the provisions of Rule 41(e) of the Federal Rules of Criminal Procedure stated in *Jones v. United States,* 362 U.S. 257, 4 L.Ed. 697, 80 S.Ct. 725 (1960), at 4 L.Ed. 704:

> This provision of Rule 41(e), requiring the motion to suppress to be made before trial, is a crystallization of decisions of this Court

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[4]*United States v. Brown,* 555 F.2d 407, 420 (5th Cir. 1977). Emphasis supplied. Also, *United States v. Check,* 582 F.2d 668 (2d Cir. 1978), at 676.

> requiring that procedure, and is designed to eliminate from the trial disputes over police conduct not immediately relevant to the question of guilt. (citations omitted).
>
> * * *
>
> As codified, the rule is not a rigid one, for under Rule 41(e) "the court in its discretion may entertain the motion [to suppress] at the trial or hearing." This qualification proves that we are dealing with carrying out an important social policy and not a narrow, finicky procedural requirement.

Although *Jones* was later overruled on other grounds, the law cited above is still binding, and in ignoring it, the Eleventh Circuit has departed from the rulings of this Court, and the fundamental law underlying it.

The last issue to be considered is whether the failure of the district court to suppress the evidence was plain error. Defendant submits that it was.

Plain error seems to be one of those legal concepts which fall under the heading of, "We don't know what it is, but we know it when we see it." In *United States v. Johnson,* 585 F.2d 119 (5th Cir. 1978), at 127, the court grappled with its elusiveness, stating:

> Plain error is an elusive concept, sometime more plainly stated than plainly perceived. There are few hard and fast classifications either in the application of the principle or in the use of the discriptive title. See *United States v. Fairchild*, 505 F.2d 1378, 1384 (5th Cir. 1975). The vagueness of its standard is not a product of imprecision in statement and analysis, but is inherent in its function.

Generally, however, the plain error has been found where the mistake is "obvious and substantial." *Sykes v. United States*, 373 F.2d 607, 612 (5th Cir. 1966). Petitioner submits that the Eleventh Circuit, in applying a rigid, formalistic interpretation to Rules 12(b)(3), and 12(c), resulting in the denial of petitioner's right to have his Motion to Suppress determined on the merits, has committed plain error mandating reversal.

CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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PROOF OF SERVICE

COMES NOW, Alvin E. Entin, Esq., on behalf of the Petitioner, RAMON MILIAN-RODRIGUEZ, and states to this Court:

1) That on January 25, 1988, the attached Writ of Certiorari submitted on behalf of the Petitioner, was mailed at the United States Post Office, Miami, Florida.

2) I certify that a true and accurate copy of the foregoing Writ of Certiorari has been furnished to Steven Schlessinger Assistant United States Attorney, 155 South Miami Avenue, Miami, Florida 33130.

3) Said statement is being submitted to this Court pursuant to Rule 28.2 of the Rules of the Supreme Court.

Respectfully submitted,

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ALVIN E. ENTIN, ESQ.

SWORN TO AND SUBSCRIBED before me this day of January, 1988.

NOTARY PUBLIC, STATE OF FLORIDA

Appendix

[4798] UNITED STATES of America,
Plaintiff-Appellee,

v.

Ramon MILIAN-RODRIGUEZ,
Defendant-Appellant.

No. 86-5036

United States Court of Appeals,
Eleventh Circuit.

Sept. 28, 1987.

Motion for suppression of evidence was granted by the United States District Court for the Southern District of Florida, Edward B. Davis, J., and Government appealed. The Court of Appeals, 759 F.2d 1558, reversed and remanded. The District Court, No. 83-419-CR-EBD, William Stafford, J., sitting by designation, denied defendant's renewed motion to suppress evidence obtained from search of aircraft and jury thereafter rendered guilty verdict on various counts of indictments and district court found defendant guilty on count of possession of cocaine with intent to distribute, and defendant appealed. The Court of Appeals, Tjoflat, Circuit Judge, held that: (1) defendant waived claim that district court should have suppressed fruits of warrantless outgoing border search of aircraft as result of untimely motion, and (2) defendant was not entitled to depose foreign witnesses.

Affirmed.

1. **Criminal Law —394.6(3)**

Defendant's motion to suppress evidence seized during warrantless outgoing border search of aircraft could be denied as untimely; district court set specific date as deadline for filing pretrial motion, but defendant did not file motion for reconsideration of suppression decision until few days before trial and 49 days after filing deadline. Fed. Rules Cr.Proc.Rule 12(b)(3), (c,f), 18 U.S.C.A.; 31 U.S.C.A. § 5317.

2. **Criminal Law —394.6(3)**

District court's indication of its view on merits of defendant's claim concerning failure to suppress evidence seized during warrantless outgoing border search of aircraft did not automatically excuse defendant's waiver of that claim, which arose from defendant's untimely presentation of claim; defendant did not show cause for his failure to raise claim and district court never indicated it would excuse waiver and decide claim solely on merits. Fed.Rules Cr.Proc.Rule 12(f), 18 U.S.C.A.; 31 U.S.C.A. § 5317.

3. **Criminal Law —1036.1(4)**

District court's failure to suppress evidence seized during warrantless outgoing border search of aircraft was not plain error, such as would excuse defendant's waiver of claim resulting from untimely motion for reconsideration of suppression motion. Fed. Rules Cr.Proc.Rule 12(f), 18 U.S.C.A.; 31 U.S.C.A. § 5317.

4. **Criminal Law —672.2 700(10)**

Government did not engage in misconduct during interview with defense witness, such as would entitle defendant to depose witness, whose subsequent unavailability defendant maintained was result of government misconduct. Fed.Rules. Cr.Proc.Rule 15(a), 18 U.S.C.A.

[4799]

5. **Criminal Law —627.2**

Defendant failed to demonstrate sufficient exceptional circumstances to warrant use of depositions with respect to foreign witnesses; claims that Government had improperly harassed potential defense witnesses and that witnesses feared for the harassment or prosecution were unfounded. Fed.Rules Cr.Proc.Rule 15(a), 18 U.S.C.A.

Appeal from the United States District Court for the Southern District of Florida.

Before TJOFLAT and EDMONSON, Circuit Judges, and MORGAN, Senior Circuit Judge.

TJOFLAT, Circuit Judge:

I.

A.

Ramon Milian-Rodriguez, the appellant in this case, is a Florida-based certified public accountant who served

as the registered agent of Cambios Monetarios Internacional, S.A. (Cambios), a Panamanian company engaged in currency trading, exchange, and investment. In his capacity as Cambios' registered agent in the United States, appellant was empowered to conduct business on behalf of that company. Beginning in November 1982, agents assigned to Operation Greenback, a Miami-based federal task force investigating currency violations, received information from law enforcement authorities in Panama that appellant was traveling frequently to Panama with extremely large sums of United States currency. Upon checking government records, federal agents found that neither Cambios nor appellant had filed Currency Transaction Reports (CTRs) and Currency and Monetary Instrument Reports (CMIRs), as required by federal law, *see* 31 U.S.C. §§ 5513, 5316 (1982).[1] Accordingly, the Government began an investigation of appellant and place him under scrutiny.

On two occasions in April 1983, federal agents observed appellant departing for Panama aboard his Lear jet, which had been loaded with suspicious cargo. They subsequently confirmed that the cargo consisted of large quantities of United States currency, for which none of the requisite disclosure forms had been filed. On the morning of May 4, 1983, federal agents, who had reason to believe that appellant would be making another trip to Panama, saw appellant's plane being loaded in precisely the same manner as on the two

[1]Unless otherwise noted, the statutory citations in this opinion refer to the relevant provisions in effect when appellant committed the criminal acts that are the subject of this appeal.

previous occasions. After appellant arrived at the airport and boarded the plane, the airport control tower personnel received the Lear jet's flight plan, which indicated that the plane would be traveling non-stop to Panama. Appellant had not filed a CMIR in connection with this flight, although he could have complied with that law at any time before boarding the plane. *See United States v. Rojas*, 671 F.2d 159, 162-63 (5th Cir. Unit B 1982).[2]

When appellant's jet proceeded to the runway for takeoff, federal agents stopped the plane, escorted the passengers and [4800] crew away from the aircraft, and searched the cabin. The cabin search revealed approximately twenty boxes containing almost $5.5 million in United States currency. In addition, the agents found appellant's attache case in the cabin. This case contained detailed records concerning appellant's money-laundering activities and documenting his transportation of approximately $146 million to Panama between August 1982 and April 1983.

While the search was taking place, the agents took appellant to an office located in the airport complex. Federal agents informed him that he was not under arrest. Nonetheless, while awaiting the completion of the search, appellant told an agent that he wished to speak with the individual who was in charge of the investigation. Two senior Customs agents then met with

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[2]In *Stein v. Reynolds Securities, Inc.*, 667 F.2d 33 (11th Cir. 1982), this court adopted as binding precedent all decisions of Unit B of the former Fifth Circuit handed down after September 30, 1981.

appellant in the airport office of his company, Consolidated Courier Service. He offered his full cooperation, at which time the Customs agents summoned an Assistant United States Attorney and read appellant his rights.

Apparantly seeking to become a government informant, appellant proceeded to admit his deep involvement in an international narcotics and money-laundering network, describing himself as the biggest money launderer in the country and characterizing his clientele as the "who's who" of the South Florida drug underworld. In addition, appellant signed a written consent authorizing Operations Greenback agents to search his business office in Coconut Grove, Florida.

Beginning that evening, federal agents conducted a thorough search of appellant's business premises, during which they encountered a locked closet in appellant's office. Appellant had told the agents that the key to the closet was in the attache case that the agents had already seized from the Lear jet, but the agents decided to pick the lock and open the closet instead of retrieving the key. The closet contained a number of bags, two of which contained several firearms, including an Uzi semi-automatic assault rifle. Another bag contained approximately sixty-two pounds of highly pure cocaine, next to which the agents found a scale and a device used to measure the purity of substances such as cocaine.

After discovering these items, the agents proceeded to appellant's home, where they placed him under arrest. He asked what had prompted the arrest and, after being informed about the cocaine, he stated that

he had forgotten that his office closet contained the illicit drugs. Appellant then consented to a search of his home, in which the agents found additional firearms and a substantial amount of counterfeit currency.

B.

The Government brought a sixty-two count indictment against appellant in the United States District Court for the Southern District of Florida. The indictment charged appellant with racketeering, unlawful transportation of drug proceeds, failure to file CTRs and CMIRs, possession of cocaine with intent to distribute, and unlawful possession of counterfeit currency. Appellant moved to suppress virtually all the evidence that had been uncovered in the course of the investigation. The district court held that the stop and search of appellant's plane was lawful, but suppressed as being beyond the scope of the consensual search the evidence that the Government had obtained by opening the locked office closet. The court also suppressed the evidence the agents had obtained [4801] from appellant's home after his arrest, finding that the agents should have obtained a search warrant. The Government appealed the district court's suppression order, *see* 18 U.S.C. § 3731 (1982) (authorizing Government appeal of suppression orders), and a panel of this court reversed. *United States v. Milian-Rodriguez,* 759 F.2d 1558 (11th Cir.), *cert. denied,* __ U.S. __, 106 S.Ct. 135, 88 LEd.2d 112 (1985). We held that appellant had consented to the search of his office closet and that his warrantless arrest and the subsequent search of his home was justified by several exigent circumstances, including the possibility that he might flee, pose a danger to arresting officers or to the public, or destroy or remove evidence.

On remand, appellant brought a renewed motion to suppress evidence obtained from the search of his plane, based on *United States v. Chemaly*, 741 F.2d 1346 (11th Cir. 1984), *vacated*, 741 F.2d 1361, *reinstated*, 764 F.2d 747 (11th Cir. 1985) (en banc). The district court denied the motion both because it was untimely and because it was meritless. The jury thereafter returned guilty verdicts on all counts of the indictment except the charge of possession of cocaine with intent to distribute, on which the jury was unable to reach a verdict, and the charge concerning possession of counterfeit currency, on which the jury acquitted appellant. By stipulation of the parties and with the consent of the district court, the cocaine possession count was submitted to the trial judge for adjudication based on the pre-existing trial record. Subsequently, the court found appellant guilty on that count. Appellant then brought this appeal, challenging his convictions on five grounds, only two of which warrant discussion. We affirm.

II.

Appellant's primary claim of error is that the district court failed to suppress the fruits of the warrantless outgoing border search of his Lear jet. According to appellant, the warrantless search of his plane violated 31 U.S.C. § 5317 (1982), as this court interpreted that statute in *United States v. Chemaly*, 741 F.2d 1346 (11th Cir.1984), *vacated*, 741 F.2d 1361, *reinstated*, 764 F.2d 747 (11th Cir.1985) (en banc). Section 5317(a) provides as follows:

> The Secretary of the Treasury may apply to a court of competent jurisdiction for a search

> warrant when the Secretary reasonably believes a monetary instrument is being transported and a report on the instrument under section 5316 of this title has not been filed or contains a material omission or misstatement. The Secretary shall include a statement of information in support of the warrant. On a showing of probable cause, the court may issue a search warrant for a designated person or a designated or described place or physical object. This subsection does not affect the authority of the Secretary under another law.

In *Chemaly,* this court observed that section 5317 imposed a *statutory* warrant requirement to protect tourists and other travelers from "random, warrantless searches" by law enforcement officers seeking evidence of federal currency reporting violations. *Chemaly,* 741 F.2d at 1350. In response to the government's contention that the "border exception" to the fourth amendment's warrant requirement rendered warrantless searches lawful, the court held that the border exception does not relieve the government of the section 5317 warrant requirement in the case of an outgoing border search involving [4802] possible currency reporting violations. *Id.* at 1351-52. We stated as follows:

> To construe the statute as suggested by the government would render it meaningless. Individuals traveling out of the country violate the currency reporting requirements at the border, if at all. Congress manifested its intent to preserve the privacy of tourists and travelers departing this country by requiring a warrant

> to search for currency reporting violations. To hold that the general border search exception allows such searches for currency violations without probable cause and a warrant would remove that privacy protection at the place where Congress intended for it to attach.

Id. at 1351 (footnote omitted). Less than one month after the *Chemaly* decision was handed down, Congress amended section 5317 to provide express authority for warrantless searches of the type invalidated in that case. Comprehensive Crime Control Act of 1984, Pub.L. No. 98-473, tit. II, § 901(d), 98 Stat. 2135 (codified at 31 U.S.C. § 5317(b) (Supp. III 1985)) ("A customs officer may stop and search, without a search warrant, a vehicle, vessel, aircraft, or other conveyance, envelope or other container, or person entering or departing from the United States with respect to which or whom the officer has reasonable cause to believe there is a monetary instrument being transported in violation of section 5316 of this title."); *see* S.Rep. No. 225, 98th Cong., 2d Sess. 302-03, *reprinted in* 1984 U.S. Code Cong. & Admin.News 3182, 3482. Nonetheless, we are bound by *Chemaly* in assessing the validity of the search in this case because the search took place on May 4, 1983, prior to Congress' 1984 clarifying amendment.

The district court denied appellant's motion to suppress on two grounds. First, it found that the motion was untimely. Alternatively, it concluded that *Chemaly* was distinguishable from the instant case because the federal agents in this case had probable cause to search appellant's plane and their failure to obtain a warrant

was excused by exigent circumstances.[3] We affirm based on the first ground and thus find it unnecessary to address the district court's alternative ground for denying the suppression motion.

[1] Under Fed.R.Crim.P. 12(b)(3), motions to suppress evidence must be made before trial. It is undisputed that appellant's motion to suppress based on *Chemaly* was made prior to trial. Rule 12(c), however, permits a district court, "at the time of the arraignment or as soon thereafter as practicable, [to] set a time for the making of pretrial motions or requests." Rule 12(f) describes the effect of a party's failure to comply with the deadlines the court has duly established:

> Failure by a party to raise defense or objections or to make requests which must be made prior to trial, at the time set by the court pursuant to subdivision (c), or prior to any extension thereof made by the court, shall constitute waiver [4803] thereof, but the court for cause shown may grant relief from the waiver.

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[3]Ruling from the bench on the suppression motion, the district court stated as follows:

> It is my view that the motion is not timely filed in [that] case law on this was well known. And this case has been—was filed in '83.
>
> But even that, reaching the merits of the decision, I find nothing here that would cause me to change the previous ruling of this Court.
>
> I find that the Government had probable cause and that there were exigent circumstances requiring the action taken here.

See United States v. Echols, 577 F.2d 308, 311 (5th Cir. 1978) (district court acted within its discretion in denying motion to suppress that was filed "over one year after the trial court had set pretrial motions to be heard and just six days before trial"), *cert. denied*, 440 U.S. 939 S.Ct. 1288, 59 L.Ed.2d 499 (1979);[4] *see also United States v. Mangieri*, 694 F.2d 1270, 1283-84 (D.C.Cir.1982) (noting limited scope of review of district court's denial of suppression motion pursuant to Rule 12(f)).

The district court in this case did not abuse its discretion in finding that appellant's presentation of the *Chemaly* argument was untimely and that the delay was inexcusable. The panel opinion in *Chemaly* was issued on September 20, 1984, and on June 6, 1985, the en banc court vacated its order granting rehearing en banc and reinstated the panel opinion. On August 16, 1985, the district court held a status conference, pursuant to which it ordered the parties to file all pretrial motions on or before September 25, 1985. The order specifically stated that "[a]ny motion filed after that date will be denied as untimely." Appellant nonetheless did not move the court for reconsideration of its suppression decision until November 13, 1985. This motion was filed within a few days of appellant's trial, forty-nine days after the district court's filing deadline, nearly fourteen months after the *Chemaly* decision, and more than five months after the en banc court denied rehearing en banc in that case. These facts

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[4]In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

demonstrate inexcusable delay and last-minute motion filing. Counsel for appellant, at oral argument before this court, defended the delay solely on the ground that he did not learn of the *Chemaly* case "until a few weeks or a week or so before I actually went ahead and made that motion." This excuse will not, and cannot, suffice in any orderly system of decision-making.

[2] Appellant contends that the waiver of his *Chemaly* argument should be excused (1) the district court, in its alternative holding, addressed the merits of this contention, or (2) the failure to suppress the incriminating evidence is plain error in light of *Chemaly*. Both of these justifications are unpersuasive. First, the district court's indication of its view on the merits of the *Chemaly* claim did not automatically excuse appellant's waiver of that claim. *See United States v. Worthington*, 698 F.2d 820, 824 (6th Cir. 1983) (district court's decision to deny suppression motion both on timeliness grounds and on the merits does not excuse waiver under Rule 12(f)); *United States v. Sisca*, 503 F.2d 1337, 1349 (2d Cir.) (same), *cert denied*, 419 U.S. 1008, 95 S.Ct. 328, 42 L.Ed.2d 283 (1974). Although the district court *"for cause shown* may grant relief from the waiver," Fed.R.Crim.P. 12(f) (emphasis added), appellant did not show cause for his failure to raise *Chemaly* in timely fashion, and the district court never indicated that it would excuse the waiver and decide the *Chemaly* issue solely on the merits. Thus, the cases appellant cites for the proposition that a party's waiver is excused if the district court proceeds to entertain the merits of the party's untimely motion, *see, e.g., United States v. Contreras*, 667 F.2d 976, 978 n. 2 (11th Cir.) (merits of suppression [4804] issue properly before court of appeals because district court entertained and ruled

on merits of suppression motion), *cert. denied*, 459 U.S. 849, 103 S.Ct. 109, 74 L.Ed.2d 97 (1982), are inapposite.

[3] Second, the district court's failure to suppress the evidence in this case in the wake of *Chemaly* was not plain error. The Government argues that *Chemaly*, 741 F.2d at 1353, is distinguishable because the law enforcement officers in that case lacked probable cause for their search, while the agents in this case indisputably had sufficient probable cause. Further, the Government notes that *Chemaly dealt solely with the border search exception to the fourth amendment warrant requirement, id.* at 1351, and did not address the exceptions for exigent circumstances and for vehicle searches, both of which arguably apply in this case. *See United States v. Rojas*, 671 F.2d 159, 165-66 (5th Cir. Unit B 1982) (finding exigent circumstances in warrantless arrest of defendant who was about to depart on an international flight while in violation of currency reporting requirements); *United States v. Flickinger*, 573 F.2d 1349, 1357 (9th Cir.) (discussing applicability of vehicle exception to search of aircraft), *cert. denied*, 439 U.S. 836, 99 S.Ct. 119, 58 L.Ed.2d 132 (1978), *overruled on other grounds, United States v. McConney*, 728 F.2d 1195 (9th Cir.), *cert. denied*, 469 U.S. 824, 105 S.Ct. 101, 83 L.Ed.2d 46 (1984). We do not intimate a conclusion on the merits of the Government's attempt to distinguish *Chemaly*, but rather hold that the district court's refusal to apply *Chemaly* to the facts of this case does not constitute plain error. *See United States v. Meadows*, 523 F.2d 365, 368 & n. 5 (5th Cir. 1975) (plain error rule applicable only when error is manifest and substantial), *cert. denied*, 424 U.S. 970, 96 S.Ct. 1469, 47 L.Ed.2d 738 (1976). Accordingly, we affirm the district court's denial of appellant's motion to suppress the fruits of the Government's search of his plane.

III.

Appellant's second contention is that the district court abused its discretion when it refused to allow him to depose foreign witnesses whom he alleged were unavailable because of Government misconduct. On September 20, 1985, appellant moved the district court to allow him to depose several foreign witnesses in Panama and Guatemala who would provide testimony favorable to the appellant and who did not want to come to the United States because they feared Government harassment.[5] *See* Fed.R.Crim.P. 15(a). In response, the Government contended that appellant's motion was untimely, was unsupported by sworn affidavits, did not establish that the foreign witnesses were unavailable, and failed to demonstrate that the witnesses would provide material testimony. Nonetheless, on October 15, 1985, the court granted appellant's motion. Two days later, the Government moved the court to reconsider its order permitting foreign depositions. The district court denied the Government's motion on October 21.

On November 7, 1985, appellant moved the court to allow him to take the deposition of Gonzalo Gomez, one of the witnesses who was to be deposed in Central America.[6] According to the motion, "Gomez has agreed to travel to Canada in order to give his deposition";

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[5]The record on appeal does not contain appellant's motion itself, but does contain his memorandum of law in support of the motion.

[6]Appellant attached Gomez' unsigned, unsworn affidavit to his motion. The affidavit indicated that Gomez would testify concerning the bag of cocaine found in appellant's office.

appellant therefore sought to take the Gomez deposition in Montreal, Canada. The court held a telephone conference on November 8, 1985, the subject of which was appellant's latest motion. At the conference, the Government stated its opposition to the motion on the same grounds that it gave concerning appellant's prior motion, as well as on the ground that Gomez' testimony would be cumulative. The court denied appellant's motion on several grounds: (1) there was no indication that Gomez was necessarily subject to criminal prosecution if he came to the United States to testify and no indication that the witness was otherwise unavailable or unable to travel; (2) Gomez' testimony was cumulative; and (3) given his willingness to travel to Canada, Gomez could travel to the United States and testify in person at the trial.

[4] Finally, on November 13, 1985, the district court addressed appellant's contention that Government misconduct had rendered defense witnesses unavailable. The district court's ruling was in the context of the Government's motion for reconsideration of the court's order adopting the Report and Recommendation of Magistrate Herbert S. Shapiro. The magistrate had concluded that the Government had acted improperly in its questioning of Bernardo Oronoz, a business associate of appellant. The district court rejected the magistrate's finding and concluded that the Government had not acted improperly. Based on the district court's analysis,[7] we also conclude as a matter

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[7]The district court discussed and disposed of the Oronoz issue as follows:

> The defendant's motion to dismiss the indictment cited several instances of alleged government misconduct. The

of law that no Government misconduct took place in this case and that the Government did not improperly cause any defense witness to be unavailable.

(Footnote 7 continued)

magistrate found that only the claims of misconduct involving Bernardo Oronoz merited any form of relief. Oronoz is a business associate of the defendant. In March 1984 the defendant sought permission to travel in foreign countries as an employee of Exportran S.A., a company owned and operated by Oronoz. During the hearing that was held on that motion, the Magistrate authorized government agents to interview Oronoz in order to determine whether Exportran was a "bona fide, legitimate operation. . . ." (Magistrate's Report and Recommendation, p. 7). The Magistrate did not expressly limit the scope of the inquiry. On the contrary, he implied that the scope of inquiry would be left to the government agent when he stated. "I'd want the DEA agent to make his inquiries and I'm sure he's astute enough to know what questions to ask. . . ." *Id.* at 8.

When the interview was held, the agent asked questions about the ownership of a home pledged as security for the defendant's bond; about whether Oronoz had agreed to pretend to purchase a shopping center; and questions about Exportran. In the motion to dismiss, the defendant argued that the interview exceeded the scope of inquiry authorized by the magistrate and caused the witness to feel intimidated and harassed. As a result, defendant claimed, Oronoz has stated he is no longer available as a defense witness. In fact, Oronoz has stated that he will rely on the fifth amendment and refuse to testify at trial if called. However, this was on the advice of his own counsel, and that advice was not necessarily related to the government interview of Oronoz. Magistrate Shapiro explained, "One cannot conclude that such advice would not have been given by counsel if the interview had never taken place."

[5] We now turn to the question whether the district court abused its discretion when it refused to

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(Footnote 7 continued)

> In his report and recommendation, the Magistrate agreed with the defendant and found that the government was guilty of misconduct. However, this court concludes that such a finding was clearly erroneous. This finding was also rejected by Judge Terrell Hodges when he reviewed the Report and Recommendation as it pertained to the defendant's trial on tax fraud charges. As explained by Judge Hodges in that case:
>
> > The Magistrate himself had expressed a proper curiosity concerning the legitimacy of the Defendant's prospective employment, and the interview was arranged with the acquiesence of the defense. It did not take place as a result of some trickery on the part of the Government, and no clear direction or instruction had been given to either the Assistant United States Attorney or to the interviewing agent concerning the precise areas to be covered or, more specifically, any precise areas that should not be covered during the interview. Moreover, it is difficult to see how the Government acquired an "unfair advantage" of the Defendant. Mr. Oronoz gave no incriminating information during the interview, nor did he give the Government any leads which later produced incriminating evidence. At the most, the witness has simply elected not to participate further on either side of the case by asserting his Fifth Amendment privilege; and, as the Magistrate himself recognized, this came about on the advice of Mr. Oronoz' counsel. . . .
>
> *United States v. Ramon Milian-Rodriguez* No. 84-161-Cr-WMH (S.D.Fla., Aug. 9, 1985) (order on all pending motions).

permit appellant to depose his foreign witnesses.[8] Federal Rule of Criminal Procedure 15(a) provides as follows:

> Whenever due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial, the court may upon motion of such party and notice to the parties order that testimony of such witness be taken by deposition. . . .

The decision whether to allow such depositions is committed to the discretion of the district court, *United States v. Bello,* 532 F.2d 422, 423 (5th Cir. 1976) (per curiam), but the use of depositions in criminal cases is not favored because the factfinder does not have an opportunity to observe the witness' demeanor. *See United States v. Wilson,* 601 F.2d 95, 97 (3rd Cir. 1979).

(Footnote 7 continued)

> There is no basis for the defendant's claims of government misconduct, nor is there any reason to find that Oronoz has been rendered "unavailable" because of the government's conduct.

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[8]The record on appeal, including the supplemental record, does not contain any written indication that the district court reconsidered or revised its October 15, 1985 order permitting foreign depositions, except as to Gomez. We are troubled by the silence of the record on this point, but will assume—as represented in the parties' briefs--that the district court reversed itself and denied appellant the opportunity to take the depositions of any of his foreign witnesses (Henry Ford, Lincoln Cohen, Jorge Cohen, Angel Avendano, Bernardo Oronoz, and Gonzalo Gomez).

The appellant in this case failed to demonstrate sufficient exceptional circumstances to warrant the use of depositions. First, appellant's motions did not include any supporting affidavits, except the unsigned, unsworn affidavit of Gomez. Second, the motions were filed in the late stages of the pretrial proceedings. Third, appellant profered no evidence of exceptional circumstances except his claim that the Government had improperly harassed potential defense witnesses and that the witnesses feared further harassment or prosecution. These allegations are the keystones on which he sought the depositions. Our conclusion that the allegations are unfounded leads us to agree with the allegations are unfounded leads us to agree with the district court's belated conclusion that appellant was not entitled to obtain the depositions. Thus, we need not address the Government's other arguments in support of the district court's ruling.

[4807] IV.

Appellant's remaining arguments are meritless and warrant no discussion. Accordingly, the judgment of the district court is

AFFIRMED.

Supreme Court, U.S.
FILED
MAY 19 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1364

In the Supreme Court of the United States

OCTOBER TERM, 1987

RAMON MILIAN-RODRIGUEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court properly denied petitioner's motion to suppress evidence on the ground that the motion was not made within the time set by the court for filing pretrial motions.

2. Whether the admission of evidence from a warrantless search of petitioner's airplane, based on probable cause and exigent circumstances, was plain error.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-20) is reported at 828 F.2d 679.

JURISDICTION

The judgment of the court of appeals was entered on September 28, 1987. A petition for rehearing was denied on November 19, 1987. On January 21, 1988, Justice Stevens extended the time for filing a petition for a writ of certiorari to January 28, 1988, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted on one count of participating in an enterprise

through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c); 47 counts of foreign travel in aid of a racketeering enterprise, in violation of 18 U.S.C. 1952; 10 counts of failing to file Currency Transaction Reports, in violation of 31 U.S.C. 5313 and 5322(b); and two counts of failing to file Currency and Monetary Instrument Reports, in violation of 31 U.S.C. 5316 and 5322(b). By stipulation of the parties and with the district court's consent, one count of possession of cocaine with intent to distribute it was submitted to the trial judge for adjudication based on the record at trial after the jury was unable to reach a verdict; the court found petitioner guilty on that count. Petitioner was sentenced to a total of 35 years' imprisonment and fined a total of $6,495,000. The court of appeals affirmed (Pet. App. 1-20).

1. The evidence at trial is summarized in the opinion of the court of appeals (Pet. App. 3-7). It showed that petitioner was a Florida-based certified public accountant who served as the registered agent of Cambios Monetarios Internacional, S.A. (Cambios), a Panamanian company engaged in currency trading, exchange, and investment. In November 1982, federal agents in Miami received information from law enforcement authorities in Panama that petitioner was traveling frequently to Panama with extremely large sums of United States currency. Upon checking government records, the agents found that neither Cambios nor petitioner had filed Currency Transaction Reports (CTRs) or Currency and Monetary Instrument Reports (CMIRs) for the currency, as required by federal law. Accordingly, the government began an investigation of petitioner and placed him under surveillance. Pet. App. 4.

In April 1983, federal agents twice observed petitioner depart for Panama aboard his heavily loaded Lear jet. They subsequently learned from Panamanian officials

that the cargo consisted of large quantities of United States currency, for which none of the requisite disclosure forms had been filed. On the morning of May 4, 1983, the agents saw petitioner's plane being loaded in precisely the same manner as on the two previous occasions. After petitioner arrived at the airport and boarded the plane, the airport control tower received the Lear jet's flight plan, which indicated that the plane would be traveling non-stop to Panama. Petitioner had not filed a CMIR in connection with that flight. Pet. App. 5.

When petitioner's jet proceeded to the runway for takeoff, federal agents stopped and searched the plane, which was loaded with almost $5.5 million in United States currency. The agents also found petitioner's attaché case in the cabin, which contained detailed records of petitioner's money-laundering activities and documented petitioner's transportation to Panama between August 1982 and April 1983 of approximately $146 million. Pet. App. 5.

While the search was taking place, the agents took petitioner to an office in the terminal. The agents told petitioner that he was not under arrest. Nonetheless, petitioner offered to cooperate fully with the investigation and become a government informant. After being advised of his rights, petitioner stated that he laundered money for a number of major narcotics dealers. Pet. App. 5-6.

Petitioner signed a written consent form, authorizing federal agents to search his business office in Coconut Grove, Florida (Pet. App. 6). During that search, agents encountered a locked closet in petitioner's office. Petitioner had told the agents that the key to the closet was in the attaché case that the agents had already seized from the Lear jet, but the agents decided to pick the lock instead of retrieving the key. The closet contained a number of firearms, including an Uzi semiautomatic assault rifle, and

approximately 62 pounds of high-quality cocaine. After discovering those items, the agents went to petitioner's home and placed him under arrest. When he was told about the cocaine, petitioner stated that he had forgotten that the office closet contained illicit drugs. Petitioner then consented to a search of his home, in which the agents found additional firearms and a substantial amount of counterfeit currency. Pet. App. 6-7.

2. Prior to trial, petitioner moved to suppress all the evidence gathered after the initial stop of his airplane. The district court upheld against a Fourth Amendment challenge the stop and search of petitioner's airplane as well as the consensual search of petitioner's office. The court, however, suppressed the guns and narcotics found in the locked office closet on the ground that the search of the locked closet was beyond the scope of petitioner's consent. The court also suppressed the evidence seized from petitioner's home after his arrest, finding that the agents should have obtained a warrant before conducting that search. Pet. App. 7. The government took an interlocutory appeal from the district court's suppression order, and the court of appeals reversed. 759 F.2d 1558, cert. denied, 474 U.S. 845 (1985). The court held that petitioner had consented to the search of his office closet; that his subsequent warrantless arrest was justified by exigent circumstances, including the possibility that he might flee or destroy or remove evidence; and that he consented to the post-arrest search of his home (759 F.2d at 1562-1565).

On remand, just prior to trial, petitioner renewed his motion to suppress the evidence obtained from the search of his airplane. This time, however, he contended that the evidence was seized not in violation of the Fourth Amendment but in violation of 31 U.S.C. 5317(a).[1] Petitioner

[1] Section 5317(a) provides:

> The Secretary of the Treasury may apply to a court of competent jurisdiction for a search warrant when the Secretary

relied on *United States* v. *Chemaly*, 741 F.2d 1346 (1984), vacated, 741 F.2d 1361, reinstated, 764 F.2d 747 (1985) (en banc), in which the Eleventh Circuit held that the predecessor to Section 5317(a) imposed a statutory warrant requirement on border searches by law enforcement officers seeking evidence of federal currency violations (741 F.2d at 1350). The district court denied the motion as untimely, noting that it had been filed 49 days after the court's filing deadline. The district court further held that, in any event, the motion was without merit. The court stated that the instant case was distinguishable from *Chemaly* because the agents in this case had probable cause to search petitioner's airplane and because their failure to obtain a warrant was excused by exigent circumstances (Pet. App. 10-11 & n.3).

3. The court of appeals affirmed, concluding that the district court "did not abuse its discretion in finding that [petitioner's] presentation of the *Chemaly* argument was untimely and that the delay was inexcusable" (Pet. App. 12). The court noted that "[petitioner's] motion was filed within a few days of [his] trial, forty-nine days after the district court's filing deadline, nearly fourteen months after the *Chemaly* decision, and more than five months after the en banc court denied rehearing en banc in that case" (*ibid.*). Petitioner's only excuse for the delay in making the motion was that his counsel did not learn of

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reasonably believes a monetary instrument is being transported and a report on the instrument under section 5316 of this title has not been filed or contains a material omission or misstatement. The Secretary shall include a statement of information in support of the warrant. On a showing of probable cause, the court may issue a search warrant for a designated person or a designated or described place or physical object. This subsection does not affect the authority of the Secretary under another law.

the *Chemaly* decision until shortly before he made the renewed motion to suppress. The court of appeals stated that "[t]his excuse will not, and cannot, suffice in any orderly system of decision-making" (Pet. App. 13). The court accordingly concluded that the motion was properly denied for "inexcusable delay and last-minute motion filing" (*ibid.*).

The court of appeals also rejected petitioner's contention that the district court's failure to suppress the evidence in light of *Chemaly* constituted plain error (Pet. App. 14). The government argued to the court of appeals that "*Chemaly* dealt solely with the border search exception to the fourth amendment warrant requirement, [741 F.2d] at 1351, and did not address the exceptions for exigent circumstances and for vehicle searches, both of which arguably apply in this case" (Pet. App. 14 (emphasis omitted)). The court of appeals did "not intimate a conclusion on the merits of the Government's attempt to distinguish *Chemaly*," but instead simply held (*ibid.*) that "the district court's refusal to apply *Chemaly* to the facts of this case does not constitute plain error."

ARGUMENT

1. Petitioner first contends (Pet. 8-14) that the district court abused its discretion in denying petitioner's suppression motion on the ground that it was untimely. Rule 12(b)(3) of the Federal Rules of Criminal Procedure requires motions to suppress evidence to be made prior to trial. Rule 12(c) explicitly authorizes the court to "set a time for the making of pretrial motions or requests." Rule 12(f), in turn, provides that "[f]ailure by a party to raise defenses or objections or to make requests which must be made prior to trial, at the time set by the court pursuant to subdivision (c), * * * shall constitute waiver thereof." Failure to file a suppression motion within the date set by a trial judge, in the absence of an adequate excuse for the

delay, is therefore a sufficient ground for denying that motion. See, *e.g.*, *United States* v. *Worthington*, 698 F.2d 820, 824 (6th Cir. 1983); *United States* v. *Mangieri*, 694 F.2d 1270, 1282-1284 (D.C. Cir. 1982); *United States* v. *Hirschhorn*, 649 F.2d 360, 364 (5th Cir. 1981).

In this case, the trial judge held a status conference on August 16, 1985, at which he ordered the parties to file all pretrial motions on or before September 25, 1985 (Pet. App. 12). The order explicitly stated that "[a]ny motion filed after that date will be denied as untimely" (*ibid.*). Nevertheless, petitioner did not make his suppression motion based on the *Chemaly* case until November 13, 1985—49 days after the district court's filing deadline, nearly 14 months after the initial decision in *Chemaly*, more than five months after the en banc court reinstated the panel decision in that case, and only a few days before trial. As the court of appeals concluded (Pet. App. 12-13), "[t]hese facts demonstrate inexcusable delay and last-minute motion filing."

Although a district court "for cause shown may grant relief from the waiver" (Fed. R. Crim. P. 12(f)), petitioner did not show cause for his failure to make the motion in a timely fashion. At oral argument before the court of appeals, counsel for petitioner defended the delay solely on the ground that he did not learn of the *Chemaly* case "until a few weeks or a week or so before I actually went ahead and made that motion" (Pet. App. 13). The court of appeals correctly concluded (*ibid.*) that "[t]his excuse will not, and cannot, suffice in any orderly system of decision-making." See *United States* v. *Mangieri*, 694 F.2d at 1283 (counsel must exercise "due diligence" in uncovering grounds for motion).[2]

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[2] Petitioner's reliance on *Jones* v. *United States*, 362 U.S. 257 (1960), is misplaced. In *Jones* this Court stated that the rule requiring

Petitioner argues (Pet. 10) that the motion in question merely "supplement[ed]" the suppression motion he filed in late 1983, before the government's interlocutory appeal, and that it rested on the same ground as the earlier motion—"that the government agents needed a warrant to search the airplane." In fact, however, the legal basis for the later motion was completely different from that of the earlier motion. Petitioner's earlier motion argued that the search of the airplane violated the Fourth Amendment. His later motion argued that the search violated Section 5317(a). It is this separate statutory argument that the district court properly rejected as untimely, not petitioner's earlier constitutional argument. See *United States* v. *Worthington*, 698 F.2d at 824 ("this third motion to suppress was not a renewal of one of the earlier motions, but rather was a new motion setting out a new reason why the evidence should be suppressed").

2. Petitioner further contends (Pet. 14-15) that, even if his suppression motion was properly denied as untimely, the admission at trial of the evidence seized from the airplane was plain error. It is well settled, however, that a claim waived in the district court under Rule 12(f) is not subject to review even for plain error. See, *e.g.*, *United*

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that a motion to suppress be made before trial is not a "rigid one" (*id.* at 264). At that time Rule 41(e) provided that "the court in its discretion may entertain the motion [to suppress] at the trial or hearing" (Fed. R. Crim. P. 41(e) (1960 ed.)), and the Court explicitly relied on that language. Rule 41, however, no longer contains that language; instead, it provides that the time for filing a motion to suppress is governed by Rule 12. See Fed. R. Crim. P. 41(f). Rule 12 provides that the failure to file a suppression motion before trial and within the time set by the district court constitutes a waiver. District courts may, of course, grant relief from the waiver "for cause shown." As both the district court and the court of appeals concluded, however, petitioner failed to show adequate cause for his failure to make a timely filing.

States v. *Mangieri*, 694 F.2d at 1284 n.15; *United States* v. *Garcia*, 672 F.2d 1349, 1368-1369 (11th Cir. 1982); *United States* v. *Contreras*, 667 F.2d 976, 978 n.2 (11th Cir.), cert. denied, 459 U.S. 849 (1982); *United States* v. *Davis*, 663 F.2d 824, 831 (9th Cir. 1981). In any event, the warrantless search of the airplane was supported by probable cause and amply justified by exigent circumstances. Thus, the admission of the evidence seized as a result of the search could not have constituted plain error.

On two previous occasions agents had observed petitioner depart for Panama with suspicious cargo that was later determined to be large amounts of currency for which none of the required disclosure forms had been filed. On the morning of May 4, 1983, the agents saw petitioner's airplane being loaded in precisely the same manner as on the two previous occasions. They learned from his flight plan that he would be traveling non-stop to Panama, and they ascertained that he had not filed a CMIR in connection with the flight. Once those events had occurred, the agents had probable cause to believe that a crime was being committed and that the cargo placed aboard the airplane would constitute evidence of the offense. The exigent circumstances justifying an immediate seizure were also clear: petitioner and his cargo were already aboard the aircraft, which was only moments away from departure on its flight to Panama.

Neither the language of the version of Section 5317 that was in effect at the time of the search of petitioner's airplane, nor the decision in *United States* v. *Chemaly, supra,* suggests that a warrantless search would be impermissible in these circumstances. In *Chemaly*, the court held that the predecessor of Section 5317 was designed to protect tourists and other travelers from "random, warrantless searches" (741 F.2d at 1350), and that the border search exception does not relieve the government of the

statutory warrant requirement (*id.* at 1351-1352). The court reasoned (*id.* at 1351 (footnote omitted)) that "[t]o hold that the general border search exception allows such searches for currency violations without probable cause and a warrant would remove that privacy protection at the place where Congress intended for it to attach." But *Chemaly* did not address the exception for searches in exigent circumstances, based on probable cause. An exception to the Section 5317(a) warrant requirement for such searches would not defeat any congressional intent to protect travelers from "random" warrantless searches. See *United States* v. *Rojas*, 671 F.2d 159, 166 (5th Cir. Unit B 1982) (in enacting Section 5317(a), "Congress did not intend to attach a warrant requirement to an otherwise lawful search"). Thus, even if the Eleventh Circuit's decision in *Chemaly* was correct, the admission of the seized evidence in this case was not an error, much less an error so "obvious" as to amount to plain error. See, *e.g.*, *United States* v. *Frady*, 456 U.S. 152, 163 (1982); *United States* v. *Granville*, 716 F.2d 819, 821 (11th Cir. 1983); *United States* v. *Blackwell*, 694 F.2d 1325, 1341 (D.C. Cir. 1982).

The question as to the validity of the airplane search under Section 5317 would not in any event warrant this Court's review in light of subsequent amendments of that provision. Less than a month after *Chemaly* was decided, Congress amended Section 5317 to permit warrantless searches at the border where there is reasonable cause to believe that a monetary instrument is being transported illegally. 31 U.S.C. (Supp. II) 5317(b). In 1986, Congress further amended Section 5317(b) to permit Customs officers to conduct warrantless searches for monetary instruments at the border without any cause whatsoever. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1355(a), 100 Stat. 3207-22 (to be codified at 31 U.S.C. 5317(b)). Accordingly, the issue of the applicability of 31

U.S.C. 5317(a) to searches such as the one in this case is of no continuing significance.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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